IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-906

THOMAS J. WALSH, JR.,
d/b/a TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT, et al., as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF OREGON

BRIEF FOR RESPONDENTS IN OPPOSITION

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January 19, 1976

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STATUTES

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penters-Employers Trust
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On Petition for A Writ of Certiorari
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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents oppose the Petition for Writ of Certiorari to The Supreme Court of Oregon requested by petitioner.

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011 (App. of Petition).

JURISDICTION

The jurisdictional requirement under 28 U.S.C. §1257(3) has not been complied with by petitioner for the reasons set-forth under "Argument".

QUESTION PRESENTED

Does a subcontractors' clause in a labor agreement in the construction industry which requires a general contractor to pay fringe benefit contributions to trust funds on behalf of employees of a non-contributing subcontractor working at the general contractor's job sit violate §§ 302 of the Labor Management Relations Act of 1947 (29 U.S.C. §186)?

STATUTE INVOLVED

The pertinent provisions of 29 U.S.C. §186(c)(5) are set forth in the Petition at pp. 3-6.

STATEMENT

The litigation concerns the requested enforcement of a labor-management agreement

by employer-employee trustees requiring fringe benefit payments from petitioner to respondents.

Petitioner is a general contractor in the building-construction industry and was engaged in constructing a housing project known as"Oak Hill, Salem, Oregon." (Tr. 17-21, 112; Pl. Ex. 3) Petitioner was a signatory party to a labor agreement (P. Ex. 4) which provided, inter alia, that if he subcontracted carpenters' work covered by the agreement, he would do so only with subcontractors who were also bound by the terms of the carpenters' labor agreement or, in the alternative, he would be liable "for payment of these employees' wages, travel, Health & Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with the Agreement." (P. Ex. 4, Article IV, App. A)

Prior to petitioner's commencing

work on the Oak Hill project, a pre-job conference was conducted between petitioner and representatives of unions representing employees who were reasonably expected to be employed on petitioner's Oak Hill ("HUD") project. These included carpenters' representatives who, at the pre-job conference (Tr. 82-83), notified petitioner that his subcontractor, Jackson, who was to do carpentry work on the project, was not bound to the carpenters labor agreement and that he would be responsible for payment of subcontractor Jackson's employees' contributions due the respective trust funds, as required by the labor agreement. (P. Ex. 4; Tr. 80-89; App. li of Petition)

By the terms of the respective trust agreements an "employer" is defined as follows:

> "Article I
> * * *
> "Section 5. Individual Employer:
> "An employer who is required by the Collective Bargaining Agreement to make contributions to the Fund, and Union and Local Unions who employ employee-members."

Jackson, not being "required by the Collective Bargaining Agreement to make contributions ...", made no payments to the trust funds for fringe benefits for his carpenter employees and paid an amount equal thereto directly to them. Petitioner did not "maintain daily records of the sub-contractors' (Jackson's) employees job site hours" (P. Ex. 4, Article IV, App. A) nor make payment to respondents. Respondents brought this suit to compel petitioner to pay such fringe benefits.

The trial court concluded that the labor contract required defendant (petitioner) to make fringe benefit payments to plaintiffs (respondents) but held that it would be "inequitable" to require payments to three of the funds (Health and Welfare, Pension and Vacation) and ordered payment

to the other two funds. (App. 1b of Petition)

On appeal, the Oregon Supreme Court held that the trial court had no authority for "equitable reasons" to deny relief to the union (Trustees) in three of the five cases and reversed those three cases and affirmed the judgments entered in the other two cases.

ARGUMENT

I.
JURISDICTION

(1) The question relating to an employee's eligibility to receive benefits from trust funds, authorized by 29 U.S.C. §186(c)(5), was not properly raised by petitioner with the Oregon Courts as required by 28 U.S.C. §1257(3).

(2) Petitioner, who is not a claimant of benefits from the trust funds, is not in a position to raise the issue of legality of eligibility for benefits.

Petitioner argues that employees

of its subcontractor are legally ineligible to obtain benefits from the trust funds and therefore the subcontractors' clause is violative of 29 U.S.C. §186((c)(5).

No claimant of benefits from the trust funds is a party to these proceedings; and, the only contention raised before the trial court and the Oregon Supreme Court was whether petitioner must pay to the trust funds contributions due for all hours worked by subcontractor Jackson's carpenter employees.

In Moglia v. Geohegan, 403 F.2d 110 (C.A. 2 1968), cert. den. 394 U.S. 919 (1969), claimants for benefits were denied the benefits because there was no written agreement between the employees' employer and the union. The trust fund in question required that there be a written agreement between the employer and the union requiring payment of contributions.

Rittenberry v. Lewis, 238 F.Supp. 506 (E.D. Tenn 1965), and Bolgar v. Lewis, 238 F.Supp. 595 (W.D.Pa. 1960), involved claims for benefits made by employees or former employees in the coal industry.

In Re Typo-Publishers Outside Tape Fund, 478 F.2d 374 (C.A. 2 1973), cert. den. 414 U.S. 1002 (1973), arose out of a proposal of union trustees of the trust fund to require that benefits be paid for hours worked by union members not employed by contributing publishers.

Petitioner, who is not an employee claimant for benefits from the trust funds, is not in a position to raise the issue of legality of benefit payments to the funds; additionally, petitioner did not properly raise the issue of legal eligibility in pleading before the trial and appellate courts.

II.
ARGUMENT
REASONS FOR THE COURT'S DENYING ISSUANCE OF THE WRIT OF CERTIORARI

THE INTERPRETATION OF 29 U.S.C.

§186 BY THE SUPREME COURT OF OREGON IN THIS CASE WAS PROPER AND IN ACCORD WITH TWO DECISIONS OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT AND A U. S. DISTRICT COURT.

The question of an employee's eligibility to receive benefits from the trust funds was not properly raised as an issue before the Supreme Court of Oregon.

Petitioner entered into a collective bargaining agreement requiring him to comply with provisions therein governing wages, hours and working conditions covering his carpenter employees (P. Ex. 4). The agreement further provided under Article IV (App. A) that should petitioner subcontract carpenter work to a non-signatory contractor, he would be legally liable for "payment of these employees' wages, travel, Health and Welfare, Pension, Vacation, Apprentice-

ship and CIAF contributions in accordance with this Agreement". (App. A)

The only issue before the Supreme Court of Oregon in the instant case was whether collection of contributions could be enforced against a contractor for payment for hours worked by his subcontractors' employees,as required under the terms of the written agreement entered into between petitioner and the union (P. Exs. 1 and 4).

Petitioner contends that there is a conflict between the Supreme Court of Oregon's decision entered in this case and the decisions of the U. S. Court of Appeals for the Second Circuit and two U. S. District Court decisions - i.e., Moglia v. Geohegan, supra.; In Re Typo-Publishers Outside Tape Fund, supra.; Rittenberry v. Lewis, supra.; and Bolgar v. Lewis, supra. Each of these cases involve claims for fringe benefits and do not

involve legality of payment of contributions to a 302(c)(5) fund.

The Oregon Court's decision entered in this case is in accord with two decisions of U. S. Court of Appeals for the Second Circuit affirming two district court decisions - Budget Dress Corp. v. Joint Board of Dress and Waistmakers' Union, 198 F.Supp. 4 (D.C. S.D.N.Y. 1961), aff'd. 299 F.2d 936 (C.A. 2 1962), cert. den. 371 U.S. 815 (1962); Minkoff v. Scranton Frocks, Inc., 181 F.Supp. 542 (D.C. S.D.N.Y. 1960), aff'd. without opinion 279 F.2d 115 (C.A. 2 1960).

In Budget, supra., the employer moved to recover contributions paid into a clothing industry trust fund covering the metropolitan area of New York. The collective bargaining agreement provided that if Budget subcontracted work, it would then be required to make payments for the subcontractors' employees - the

same issue raised in the instant case.

Following lengthy proceedings, an arbitration award directed Budget to make payments due the trust funds for hours worked by employees of its subcontractors. District Judge Ryan 1/ in an extensive opinion sustained the award holding:

> "We conclude, as have our colleagues before us, that the statute is in no way concerned with the technical aspects of determining and administering benefits under legitimate plans as defined and made up in accordance with statutory directive (302)(c)(5)(B)) .... So long as the funds are used for the benefit of the employees and not diverted to other uses, the statutory immunity applies to these payments-regardless of whether in a proper case a remedy might lie open to an individual employee against the Trustees of the Fund. No claim is here made that these payments

1/ Chief Judge J. Ryan also issued the district court opinion in Moglia v. Geohegan, supra. Neither in the district court's opinion nor in the second circuit's affirming opinion was any mention made of Budget or Minkoff, supra.

> were not so used."
> 198 F.Supp. at 12

2/ and 3/

2/ Judge Ryan cited with approval Judge Metzner's decision in Minkoff v. Scranton Frocks, supra.:

> "Judge Metzner...had before him precisely the same Funds and type of agreement between the Union and Joint Board. The argument there made was that because some of the contractor's employees had been expelled from the union, they were not eligible for benefits under the Funds and that, consequently, the payments made on their behalf to the Funds were in contravention of the statutory requirement that the payments be for their sole and exclusive benefit .... He further held that denial of benefits, if any, was a matter to be settled between the worker and the Funds and no part of the statutory scheme of Section 302(c)(5), and that 'by no stretch of imagination' could the plans be considered other than legitimate."
> 198 F.Supp. at 11

3/ Judge Ryan also stated in his Opinion:

> "Finally, in Kreindler v. Clarisse Sportwear Co., 184 F.Supp. 182 (1960), a similar contention was made by a manufacturer whose contractors' employees were not unionized.

In affirming Budget Dress, supra., the Second Circuit stated:

> "Appellant seeks to recover monies paid into certain health, welfare and retirement funds on the grounds that payments violated Section 302 of the Labor-Management Relations Act, 29 U.S.C.A. §186. On the basis of Minkoff v. Scranton Frocks, Inc., 181 F.Supp. 542 ... aff'd. per curiam 279 F.2d 115 ... (2 Cir. 1960) and the opinion of Chief Judge Ryan in the present case insofar as it deals with the merits of appellant's claim under Section 302, we affirm." 299 F.2d. 936

III.

DAVIS-BACON ACT IS NOT MATERIAL HEREIN

Work performed by petitioner on the

(3/) The Court, confirming the arbitrator's award, assumed (and it does not appear whether it was contested) that such non-union workers were not eligible for benefits under the Funds but said that, nevertheless, since the payments were of the type contemplated by the statute-for the sole and exclusive benefit of employees-there was no need that they be set up by each employer for his own particular employees." 198 F.Supp. at 12

Oak Hill project was subject to the provisions of the Davis-Bacon Act (40 U.S.C. §276(a)); however, the purpose of the Davis-Bacon Act is to require an employer to pay no less than the prevailing wage and fringe benefits as established by the Secretary of Labor - admittedly the same rate and fringes established by the Carpenters Master Labor Agreement (P. Ex. 4).

While it is true that under the terms of the labor agreement a non-signatory subcontractor cannot pay to the trust funds, the labor agreement requires that petitioner pay for hours worked by the subcontractor's employees, i.e., the same requirement that Budget, supra., enforced.

Petitioner was advised that he must comply with the terms of the labor agreement and pay fringe benefits for hours worked by Jackson's employees. (App. 1h-1i of Petition). It was petitioner's choice

not to make the fringe benefit payments to the trust funds. Petitioner could have avoided double payment by withholding from Jackson the sum necessary to cover these contributions. The decision of the Oregon Court upholding petitioner's contractual obligation does not require double payment by a contractor contracting with a non-union subcontractor. Prevailing fringe benefits paid into a trust fund satisfies the Davis-Bacon Act. A contractor with a governmental agency has the responsibility to assure these fringe benefit payments are made and it is immaterial under the provisions of the Act who pays. (40 U.S.C. 276a)

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Respondents acknowledge that a majority of collective bargaining agreements in the construction industry provide for subcontractors' clauses. Such clauses are

permitted by 29 U.S.C. §158(e). Congress specifically exempted the construction industry from the prohibition against secondary boycotts by enacting §158(e). Congress similarly excluded the clothing industry from certain prohibited secondary boycott acts.

Contrary to petitioner's statement that the decision of the Supreme Court of Oregon appears to be the first decision sustaining the validity of the type of subcontractors' clause referred to herein, the Second Circuit decisions in Budget and Minkoff, supra., determined the validity and enforceability of subcontractor clauses. Respondents' search of the cases discloses no holding which conflicts with these cases. It appears to respondents that the construction industry has accepted the Second Circuit Court's decisions (the same interpretation as the Oregon court) and therefore no important federal question

now exists.

Petitioner's reference to Connell Construction v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 44 L.Ed. 2d 418 (1975), is not material to review of the issues raised in this case. Connell involved a claimed violation of the Sherman Anti-Trust Act. 15 U.S.C. 1 and 2 - An issue not raised herein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated at Portland,
Oregon this 19th day
of January, 1976.

APPENDIX

Article IV
of the
Carpenters Master Labor Agreement

"Sub-Contractors Clause

"If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such sub-contractor to be bound to all the provisions of this Agreement, or such contractor shall maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement.

"The Union agrees to notify the contractor, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions owed by the sub-contractor, and to further issue a certificate to the contractor when these payments have been made. (Clarification: With respect to fringes the 30 day period starts

on the day after the report is due to the trust administrator."